A

KOPERASI KASTAM DIRAJA MALAYSIA BHD v. YI GO GROUP SDN BHD

COURT OF APPEAL, PUTRAJAYA
HANIPAH FARIKULLAH JCA
HAS ZANAH MEHAT JCA
B LEE SWEE SENG JCA
[CIVIL APPEAL NO: P-03(IM)(NCVC)-60-07-2019]
30 AUGUST 2021

C ***CONTRACT:*** *Breach – Damages – Assessment of – Contract for services consisting of rental of storage containers and machines – Failure of payment for rental – Termination of contract after three months when it was agreed to be for five years – Repossession of equipment – Whether terms of contract allowed for damages to be claimed for unexpired period of contract based on agreed monthly rental – Whether plaintiff proved losses arose out of defendant's breach of contract – Whether*
D *plaintiff might have rented out equipment repossessed from defendant – Whether nominal damages awarded by Registrar reasonable*

DAMAGES: *Assessment – Computation – Contract for services consisting of rental of storage containers and machines – Failure of payment for rental – Plaintiff terminated contract after three months and repossessed equipment – Whether terms*
E *of contract allowed for damages to be claimed for unexpired period of contract based on agreed monthly rental – Whether plaintiff proved losses arose out of defendant's breach of contract – Whether plaintiff might have rented out equipment repossessed from defendant – Whether nominal damages awarded by Registrar reasonable*

F This appeal explored the issue of how to assess damages for breach of a contract when it was terminated after three months into the contract that was agreed to be for five years. The contract was for services to be provided consisting of rental of ten used storage containers and two other items consisting of a forklift and a crane to be operated by the respondent's ('plaintiff's') workers. The plaintiff was in the business of letting out used
G storage containers and machines and had a fixed rate of rental for the containers and the machines in a forklift and a crane with even a minimum use expressed in the number of times the machines are to be used per month. The appellant ('defendant') was a Cooperative of the Royal Customs of Malaysia. The plaintiff had given two quotations to the defendant which
H included, *inter alia*, that the plaintiff would rent units of used storage containers to the defendant, and the defendant confirmed the quotations and enclosed the corporate guarantee for the period of five years. The plaintiff then delivered to the defendant the ten used storage containers and the two machines. The plaintiff issued invoices for the months of October to
I December 2017, but the defendant failed to pay. As there was no payment forthcoming, the plaintiff terminated the contract and commenced legal

action. The plaintiff's claim was for the recovery of the outstanding amount of RM143,877.90 ('outstanding amount') and the sum of RM40,000 being a return of the commitment fee. The plaintiff further prayed for judgment for the sum of RM3.6 million and for general damages to be assessed. The plaintiff said its loss was not just the amount invoiced for the first three months for which payment had not been made but also damages calculated based on the whole of the contract period of five years, being the rental it would have received had the contract been performed to its expiry date. The defendant said that while it was liable to pay for the amount invoiced for the first three months of the contract, the plaintiff must prove its loss arising from the defendant's breach. To award damages based on the rental, which the plaintiff could have collected if there had been no breach when it had taken back the storage containers and the machines, would be to allow double recovery of the loss and overcompensating and enriching the plaintiff as a result. The Registrar granted only nominal damages of RM100,000 on the ground that the plaintiff failed to adduce evidence to prove the losses suffered. On appeal, the High Court reversed the decision of the Registrar and awarded a sum of RM3.6 million with interest at 5% per annum from the date of writ to realisation and costs of RM5,000. Hence, this appeal. The issues that arose were (i) whether the terms of the contract allowed for damages to be claimed for the unexpired period of the contract based on the agreed monthly rental; (ii) whether the plaintiff had proved its losses arising out of the defendant's breach of the contract; and (iii) whether the award of RM100,000 by the Registrar as nominal damages was reasonable and right in the circumstances of the case.

Held (allowing appeal and affirming decision of Registrar; setting aside RM3.6 million awarded by High Court Judge)
Per Lee Swee Seng JCA delivering the judgment of the court:

(1) There was evidence to show that the storage containers and the two machines had been removed by the plaintiff from the defendant's premises in early January 2018. Surely, it would be overcompensating the plaintiff if damages was calculated based on the whole five-year contract period at the agreed rate because the plaintiff now had the benefit of the ten used storage containers and the forklift and crane in its possession which it could let out to others. On top of that, the plaintiff in being granted the whole of the rentals for the five-year period, would have the benefit of the whole of the contract sum payable under the contract being paid upfront even before the expiry of the contract and just after three months into the contract. That could not be right and did not compute with the established principles of assessment of damages for a breach of contract. The assessment of damages based on the entire period of the contract and the agreed rates had the contract been carried through to its completion, would be far in excess of the losses suffered

A and thus inappropriate as there was no evidence led that the plaintiff could not let out the ten used storage containers, the forklift and the crane after repossession from the defendant. To allow damages based on the amount to be collected for the entire term of the contract of five years would be disproportionate and excessive. Instead of compensating
B the plaintiff for its loss, it would be causing the plaintiff to profit from its loss which was not the principle in awarding damages upon a breach of a contract. (paras 22, 23, 25, 26 & 28)

(2) The plaintiff was noticeably silent about whether the ten used storage containers and the two machines in the forklift and the crane had been
C let out to others or been lying idle since the breach. If by compensating the plaintiff by way of reference to the contract not having been breached, then the containers and the machines should not have been repossessed but that they should still be available to the defendant to use and that because of the breach, the defendant would now have to, on the
D pain of execution, pay the whole of the five-year rentals in advance. However, the plaintiff wanted to have the best of both worlds: to take back possession of the containers and the machines and at the same time sue to recover what it could have obtained from the defendant in terms of the rentals for the five year period of the contract. In the absence of
E evidence as to what the plaintiff had done with respect to the ten used storage containers and the machines, it would not be for the court to speculate on its losses. The plaintiff had not proved its loss of RM3.6 million calculated based on the full five-year term of the contract at the agreed rates of rentals for the ten used storage containers and the machines. (paras 39, 40, 56, 57, 61 & 62)

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(3) The plaintiff had already claimed for the amount it had invoiced for October to December 2017 and for which summary judgment had been entered. The plaintiff had taken possession of the used storage containers and the machines in the forklift and the crane soon after the defendant
G defaulted in payment. The containers and machines were not custom-made or designed specially for the defendant only. They appeared to be generic and common enough. The plaintiff had not led any evidence on its costs in this contract and this was not a case where the plaintiff had stated that there were no costs involved. Where there is loss or damage suffered but the party claiming has failed to prove the damages, then
H only nominal damages would be awarded. A sum of RM100,000 as nominal damages for breach of contract was not without precedent. Thus, this court would not disturb the said sum as nominal damages awarded by the Registrar. (paras 66, 68, 70-72, 76 & 78)

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Case(s) referred to:
Ban Chuan Trading Co Sdn Bhd & Ors v. Ng Bak Guan [2003] 4 CLJ 785 CA ***(refd)***
Beaumont v. Greathead (1846) 2 CB 494 ***(refd)***
Cubic Electronics Sdn Bhd (In Liquidation) v. MARS Telecommunications Sdn Bhd [2019] 2 CLJ 723 FC ***(refd)***
Davies v. Powell Duffryn Associated Collieries Ltd [1942] AC 601 ***(refd)***
Delpuri-Harl Corp JV Sdn Bhd v. Perbadanan Kemajuan Negeri Selangor [2014] 1 LNS 1075 CA ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Guan Soon Tin Mining Company v. Wong Fook Kum [1968] 1 LNS 43 FC ***(refd)***
Lay Hong Food Corporation Sdn Bhd v. Tiong Nam Logistics Solutions Sdn Bhd [2017] 10 CLJ 680 CA ***(refd)***
Sapwell v. Bass [1910] 2 KB 486 ***(refd)***
SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor [2016] 1 CLJ 177 FC ***(refd)***
Tahan Steel Corporation Sdn Bhd v. Bank Islam Malaysia Bhd [2012] 1 CLJ 959 CA ***(refd)***
Toeh Kee Keong v. Tambun Mining Company Ltd [1967] 1 LNS 197 FC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 74(1)

For the appellant - Jastina Mohd Junus; M/s Chambers of Jastina Mohd Junus
For the respondent - Ng Kok Chong; M/s Wong & Loh

[Editor's note: Appeal from High Court, Pulau Pinang; Civil Suit No: PA-22NCVC-54-04-2018 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Lee Swee Seng JCA:

[1] This appeal explores the issue of how to assess damages for breach of a contract when it was terminated after three months into the contract that was agreed to be for five years. The contract was for services to be provided consisting of rental of ten used storage containers and two other items consisting of a forklift and a crane to be operated by the plaintiff's workers.

[2] The plaintiff was in the business of letting out used storage containers and machines and had fixed rate of rental for the containers and the machines in a forklift and a crane with even a minimum use expressed in the number of times the machines are to be used per month.

[3] The defendant is a Cooperative of the Royal Custom of Malaysia. The plaintiff said its loss is not just the amount invoiced for the first three months for which payment had not been made but also damages calculated based on the whole of the contract period of five years, being the rental it would have received had the contract being performed to its expiry date.

[4] The defendant said that while it is liable to pay for the amount invoiced for the first three months of the contract, the plaintiff must prove its loss arising from the defendant's breach. To award damages based on the rental, which the plaintiff could have collected if there had been no breach when it had taken back the storage containers and the machines would be to allow double recovery of the loss and overcompensating and enriching the plaintiff as a result.

[5] The Registrar on 24 April 2019 granted only nominal damages of RM100,000 on the ground that the plaintiff had failed to adduce evidence to prove the loss suffered. Interest was also granted at the rate of 5% per annum from 16 April 2018 (date of writ) to realisation and costs of RM1,000 to the plaintiff. The Registrar was not satisfied that the loss may be quantified based on the number of years of the contract multiplied by the agreed rental rate.

[6] On appeal, the High Court on 25 June 2019 reversed the decision of the learned Registrar and awarded a sum of RM3.6 million with interest at 5% per annum from 16 April 2018 (date of writ) to realisation and costs of RM5,000.

[7] The defendant, being dissatisfied with the decision of the High Court, had appealed to the Court of Appeal.

[8] There was an earlier summary judgment filed for which the High Court had granted judgment for the liquidated sum of RM143,877.90 and a refund of the commitment fee of RM40,000 from 27 December 2017 and general damages to be assessed. It is the amount of damages assessed that is in issue here.

[9] The parties shall be referred to as they were in the High Court as plaintiff and defendant. The plaintiff is the respondent before us and the defendant is the appellant.

Whether The Terms Of The Contract Allow For Damages To Be Claimed For The Unexpired Period Of The Contract Based On The Agreed Monthly Rental

[10] The plaintiff had given two quotations to the defendant. The salient terms of the first quotation dated 19 September 2017 are as follows:

(i) The plaintiff will rent seven units of used 20' storage container to the defendant and the rental rate is fixed at RM100 per day or RM700 per month and rent three units of used 20' reefer container and the rental rate is fixed at RM300 per day or RM1,750 per month (hereinafter referred to as "the containers");

(ii) A corporate guarantee by the defendant is to be issued with an amount minimum of RM600,000, which is valid for five years to the plaintiff upon confirmation of this quotation; and

(iii) All prices and quotes shall be valid within 1,825 days (which is equivalent to five years) from the date of this quotation letter.

[11] The second quotation, also dated 19 September 2017 has the following key terms:

(i) the plaintiff will rent one unit of forklift at the rental rate of RM70 per lift and one unit of crane at the rental rate of RM120 per lift to the defendant (hereinafter referred to as "the machines");

(ii) a corporate guarantee by the defendant is to be issued with an amount minimum of RM3,000,000 which is valid for five years to the plaintiff upon confirmation of this quotation;

(iii) a minimum volume of 300 lifts/month applies to all machinery stated above shall be guaranteed by the defendant;

(iv) a minimum 4+1 year performance bond by both parties for this proposal; and

(e) all prices and quotes shall be valid within 1,825 days (which is equivalent to five years) from the date of this quotation letter.

[12] The defendant confirmed and approved of the first quotation and second quotation *vide* its letter of 20 September 2017 and enclosed the corporate guarantee for the period of five years. The defendant also followed up with the issuance of two letters of award dated 26 September 2017 for the contract period is five years corresponding to the two quotations. The two quotations and its acceptance by the defendant would constitute the contract.

[13] The plaintiff, on its part, performed its obligation by paying the commitment fee of RM40,000 to the defendant.

[14] The plaintiff had then delivered to the defendant at the cargo depot of the defendant at Kota Putra Rubber City, Durian Burung, Kedah, the ten used storage containers and the two machines.

[15] The plaintiff issued invoices for the months of October to December 2017, but the defendant failed to pay. The statement of account as at December 2017 showed that an amount based on the contract rates amounting to RM143,877.90 was outstanding.

[16] A notice of demand was sent by the plaintiff's solicitors dated 27 December 2017 given seven days' notice for the defendant to pay stating that:

> failing which we have strict instructions from our client to **terminate the Services including moving out the containers, equipment and machines from the Premises** and to commence legal action in court ...

[17] There was no payment forthcoming and the plaintiff terminated the contract and commenced legal action by filing the writ on 16 April 2018.

[18] The plaintiff's claim is for the recovery of the outstanding amount of RM143,877.90 ("outstanding amount") and the sum of RM40,000 being a return of the commitment fee. The plaintiff further prayed for judgment for the sum of RM3.6 million and for general damages to be assessed.

[19] The plaintiff applied for summary judgment and the High Court granted summary judgment for the outstanding amount and the refund of the commitment fee with an order for general damages to be assessed.

[20] The learned Registrar then duly assessed the general damages and granted nominal damages of RM100,000 with interest of 5% per annum from 16 April 2018 to realisation and costs of RM1,000 principally on the finding that the plaintiff had failed to prove its loss.

[21] To begin with, there are no agreed liquidated damages clauses in the contract. Even if there had been such a clause to the effect that the agreed damages shall be based on the rentals for the unexpired period, that would not necessarily mean that the plaintiff would succeed for the defendant would have the opportunity to adduce evidence to show that such an award would be unreasonable in the circumstances of the case in that it would be over and above the loss suffered by the plaintiff for the defendant's breach. See the Federal Court case of *Cubic Electronics Sdn Bhd (In Liquidation) v. MARS Telecommunications Sdn Bhd* [2019] 2 CLJ 723 at paras. [70] and [71].

[22] Here, there is evidence to show that the storage containers and the two machines had been removed by the plaintiff from the defendant's premises in early January 2018. See text message at p. 51 of encl. 3 affidavit in reply of Yap Yee Cheng, a director of the plaintiff.

[23] Surely it would be overcompensating the plaintiff if damages is calculated based on the whole five-year contract period at the agreed rate because the plaintiff now had the benefit of the ten used storage containers and the forklift and crane in its possession which it could let out to others.

[24] The nature of the items let out appeared to be in high demand where the plaintiff's stock is concerned for it was stated both for the containers and the machine that the supply is subject to availability as can be seen in the first quotation and second quotation at pp. 13 and 15 of encl. 3.

[25] On top of that, the plaintiff in being granted the whole of the rentals for the five-year period, would have the benefit of the whole of the contract sum payable under the contract being paid upfront even before the expiry of the contract and just after three months into the contract. That cannot be right and does not compute with the established principles of assessment of damages for a breach of contract.

[26] What we can say here, and we do so with the greatest of respect to the learned High Court Judge, is that the assessment of damages based on the entire period of the contract and the agreed rates had the contract been carried through to its completion, would be far in excess of the loss suffered and thus inappropriate as there is no evidence led that the plaintiff could not let out the ten used storage containers, the forklift and the crane after repossession from the defendant.

[27] The Federal Court in *Cubic Electronics* (*supra*) referred to the principle of proportionality in assessing damages and though it was spoken of in the context of a sum stated as agreed damages in the event of a breach, the proportionality principle would cut evenly across all claims for damages where to grant damages based on loss of revenue for the unexpired balance term of the contract would be excessive and disproportionate to the actual loss that may be suffered. It propounded as follows:

> [68] Consequently, regardless of whether the damage is quantifiable or otherwise, it is incumbent upon the court to adopt a common sense approach by taking into account the legitimate interest which an innocent party may have and **the proportionality of a damages clause in determining reasonable compensation**. This means that in a straightforward case, reasonable compensation can be deduced by comparing the **amount** that would be payable on breach with the **loss** that might be sustained if indeed the breach occurred (emphasis added). Thus, to derive reasonable compensation, there must not be a significant difference between the level of damages spelt out in the contract and the level of loss or damage which is likely to be suffered by the innocent party.
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> (emphasis added)

[28] We are of the considered view that to allow damages based on the amount to be collected for the entire term of the contract of five years would be disproportionate and excessive. Instead of compensating the plaintiff for its loss, it would be causing the plaintiff to profit from its loss which is not the principle in awarding damages upon a breach of a contract.

Whether The Plaintiff Had Proved Its Losses Arising Out Of The Defendant's Breach Of The Contract

[29] The principles governing the assessment of damages upon a breach of contract are known to all in the law. The non-defaulting party is entitled to claim damages for the breach of contract by the defaulting party.

[30] What may be claimed is captured in s. 74 of the of the Contracts Act 1950, which provides as follows:

> (1) When a contract has been broken, the party who suffers by breach is entitled to receive, from the party who has broken the contract, **compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it**.

A (2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

(3) When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default as if the person had contracted to discharge it and had broken his contract. (emphasis added)

[31] The first limb of s. 74(1) of the Contracts Act 1950, deals with direct loss and the second limb with indirect loss. Here we are concerned only with direct loss, for it was not alleged that the plaintiff's loss falls within that C which the parties knew, when they made the contract, to be likely to result from the breach.

[32] The Federal Court in *Toeh Kee Keong v. Tambun Mining Company Ltd* [1967] 1 LNS 197; [1966] 1 MLJ 39 at p. 40 (MLJ) expounded the s. 74(1) of the Contracts Act 1950 as follows:

D The rule lays down the main principles as follows:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, i.e. according E to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

In more compendious terms the rule has been restated by Asquith L.J. in F *Victoria Laundry (Windsor) Ltd Newman Industries Ltd* [1949] 2 KB 528 539 in a passage which I shall quote in full:

(1) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed: (*Sally Wertheim Chicoutimi Pulp Co* [1911] AC 301.) This purpose, if G relentlessly pursued, would provide him with a complete indemnity for all loss *de facto* resulting from a particular breach, however improbable, however unpredictable. This, in contract at least, is recognised as too harsh a rule. Hence,

H (2) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach.

(3) What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the I party who later commits the breach.

(4) For this purpose, knowledge 'possessed' is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the 'ordinary course of things' and consequently what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the 'first rule' in *Hadley v. Baxendale*, *supra*. But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the 'ordinary course of things', of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the 'second rule' so as to make additional loss also recoverable.

(5) In order to make the contract-breaker liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplate not the breach of the contract, but its performance. It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result (see certain observations of Lord du Parcq in the recent case of *Monarch Steamship Co Ltd Karlshamns Oljefabriker (A/B)* [1949] AC 196).

(6) Nor, finally, to make a particular loss recoverable, need it be proved that upon a given state of knowledge that defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough if he could foresee it was likely so to result. It is indeed enough, to borrow from the language of Lord du Parcq in the same case, at page 158, if the loss (or some factor without which it would not have occurred) is a 'serious possibility' or a 'real danger'. For short, we have used the word 'liable' to result. Possibly the colloquialism 'on the cards' indicates the shade of meaning with some approach to accuracy.

[33] The burden of proof is on the party claiming damages. In *Ban Chuan Trading Co Sdn Bhd v. Ng Bak Guan* [2003] 4 CLJ 785; [2004] 1 MLJ 411, the Court of Appeal reiterated as follows:

> The burden of proving the damages is always on the parties claiming the damages. In *Tan Geok Khoon & Gerard Francis Robless v Paya Terubong Estate Sdn Bhd* [1988] 2 MLJ 672 at p. 680, Edgar Joseph Jr J (as he was then) said:
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> > This brings to my mind the famous words of Lord Goddard in *Bonham-Carter v. Hyde Park Hotel* (1948) 64 TLR 177:
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> > > plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying: This is what I have lost, I ask you to give me these damages'. They have to prove it.

A Thus, in *Ashcroft v. Curtin* [1971] 1 WLR 1731, a plaintiff claiming for diminution in the profits of his one man business could not succeed in this claim though the evidence pointed to a decrease in profitability which "was due to the injury, the records kept being too rudimentary and the accounts too unreliable to quantify the loss".

B **[34]** The compensation here is for the loss or damage which naturally arose in the usual course of things from the breach. Under s. 74(1) of the Contracts Act 1950 and the first limb thereof, the plaintiff is allowed to claim for losses that arise naturally from the breach. That would involve the loss arising from not being able to let out the items repossessed to another customer or perhaps letting them out at a lower rate or perhaps only being able to let out intermittently.

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[35] Instead, the plaintiff here is claiming for the loss of revenue as general damages for the revenue it would have grossed in if the contract has been allowed to operate for its full five-year term.

D **[36]** The question is whether that is allowed in law in the circumstances of this case.

[37] Parties had agreed that the assessment of damages be done by way of affidavit evidence. The application in the form of a notice of appointment for assessment of damages ("assessment application") was filed on 29 October 2018 together with an affidavit in support of its director Yap Yee Cheng affirmed on the same day.

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[38] The defendant filed its affidavit in opposition affirmed by one Shahrizul bin Ismail affirmed on 30 November 2018. This was followed by the last affidavit in reply of the plaintiff by the said Mr Yap Yee Cheng on 19 December 2018. The Registrar heard the matter and decided accordingly on 24 April 2019. By the time of the assessment application, only one year had passed from the date of the contract.

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[39] We had stated the dates of the affidavits filed for the purpose of the assessment of damages to show the fact that if the ten used storage containers had not been let out to others, the plaintiff would have the opportunity to state so. Likewise, if the two machines in the forklift and the crane could not be let out and had been lying idle since the breach.

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[40] The fact that the plaintiff was noticeably and even sheepishly silent on it when it should have spoken would lend credence to the inference that may be made, that at the very latest, by the time assessment application supported by the plaintiff's affidavit was filed on 29 October 2018 the ten containers and the two machines had been let out. Otherwise, the plaintiff can always issue an invitation to view these still lying in its warehouse.

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[41] The burden of proof is on the plaintiff to adduce evidence on its losses sustained.

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[42] This may include the costs incurred in advertising for letting these containers and machines and the number of days that these items were left idling in the warehouse. In a case where the plaintiff had let these items out but at a lower price than that quoted for and agreed to by the defendant, the plaintiff could produce evidence of it and sue for the difference in the rates. However, there was no such evidence.

[43] Even in cases where the containers and the machines are not let out at all because there was no demand for them at all, the plaintiff would only be able to claim the loss of profit and not the loss of revenue from the rental, which it could have obtained for as stated earlier, there is the costs element in all businesses, whether it be fixed or variable costs or a combination of them.

[44] The ordinary meaning of profit is that one should deduct one's costs from the revenue to be collected. Here the plaintiff had not disclosed his costs which may well include the costs of financing of the containers, the forklift, the crane, insurance and maintenance. After all, the containers are used containers and not brand new ones tailored to the defendant's needs.

[45] There is also the element of costs for operating the forklift and the crane because the rental rates quoted include the plaintiff's appointed staff who alone can operate the machine as stated in Appendix 1A under "general terms and conditions of supply and service" under "B. Operator" where is it stated: "Only Yi Go Group Sdn Bhd appointed staff/operator can operate the equipment/machine."

[46] The rate of rental usage is expressed in terms of per lift with a minimum of 300 lifts per month for each machine. Surely besides labour costs of its own operator that the plaintiff had to bear, there are also the fuel costs in operating the forklift and the crane for these machines would use up energy and power to lift heavy loads. All these had not been disclosed in the plaintiff's two affidavits filed.

[47] Time and again, this approach of claiming for the balance of the amount that could be collected for the balance period of a contract for work to be done or rental to be collected or a combination has come before our courts. The Court of Appeal in *Lay Hong Food Corporation Sdn Bhd v. Tiong Nam Logistics Solutions Sdn Bhd* [2017] 10 CLJ 680; [2018] 2 MLJ 66, when presented with such a claim, had this to say:

> [48] On another note, the basis of the claim by the plaintiff (TN Logistics) for damages for loss of profits is based on an average of sales multiplied by six months. The plaintiff (TN Logistics) is relying on the average gross sum of the invoice value. *This cannot be an accurate figure as overhead costs such as petrol, the costs of hiring of drivers, operation costs and maintenance has to be factored in, to arrive at a net figure. Only then can a realistic profit figure be arrived at. To allow such a manner of calculation as adduced by the plaintiff (TN Logistics)*

would be to allow the plaintiff (TN Logistics) to claim for more than what it was entitled to, which is plainly wrong. The Federal Court in *SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor* [2016] 1 MLJ 464; [2016] 1 CLJ 177 had occasion to deal with this point when it held that:

> However, we do not approve of the appellant's method of calculation for the loss of profits ... This calculation does not reflect the principles of compensation for loss of profits and will put the appellant in a position well beyond that which it would rightfully be in, had the contract been properly performed. A calculation based on 'commissions', that is to say receipts, is very different from a calculation based on 'profits'. *To award damages based on commissions would completely disregard the fact that had the contract been properly performed the appellant would have had to incur expenses and costs of operation, among other things. The proper sum should therefore be net of all the expenses that would be reasonable incurred in the remaining 20 month period*. To do otherwise would give the appellant more than they would have obtained had the contract been performed, and therefore more than what they rightfully deserved.
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> (emphasis added)

[48] The Federal Court in *SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor* [2016] 1 CLJ 177; [2016] 1 MLJ 463 further explained the need to determine the loss of profit for an unexpired term of a contract as follows:

> [119] This calculation [based on commission] does not reflect the principles of compensation for loss of profits and will put the appellant in a position well beyond that which it would rightfully be in, had the contract been properly performed. A calculation based on 'commissions', that is to say receipts, is very different from a calculation based on 'profits'. To award damages based on commissions would completely disregard the fact that had the contract been properly performed the appellant would have had to incur expenses and costs of operation, among other things. *The proper sum should therefore be net of all the expenses that would be reasonably incurred in the remaining 20 month period. To do otherwise would give the appellant more than they would have obtained had the contract been performed, and therefore more than what they rightfully deserved*. However, contrary to the respondent's submission and the judgment of the trial judge, the mere fact that the formula was the appellant's own formulation (presumably in contradistinction with a formula provided for within the contract) is not a ground for rejecting the formula. The agreement did not stipulate a formula for calculating loss of profits, and as such the general principles of the common law will apply and a formula that best estimates the future loss of profits will be preferred by the court. (emphasis added)

[49] The plaintiff had steered clear in not disclosing that and preferring to be put in a position where the contract had not been breached. If that be the case then the plaintiff should not have taken back possession of the containers

and the machines but just to sue based on the rental that it could have obtained but being able to get it in advance and before the expiry of the contract term for breach by the defendant.

[50] In para. 16 of the plaintiff's affidavit in support, the plaintiff's director set out the claim of profit and/or loss of opportunity as follows:

(A) The First Quotation - The Containers

(B)

(I) Used 20' Storage Container

7 units x RM700.00 (rental rate per month)	RM4,900
Contract Period	5 years
Total	RM294.000

(II) Used 20' Reefer Container

3 units x RM1,750.00 (rental rate per month)	RM5,250
Contract Period	5 years
Total	RM315,000

RM294,000 + RM315,000 = RM609.000

(B) The Second Quotation - The Machines

(I) Forklift

One unit x RM70.00 (per lift) x 300 (minimum volume of lift per month)	RM21,000
Contract Period	5 years
Total	RM1,260,000

(II) Crane

One unit x RM120.00 (per lift) x 300 (minimum volume of lift per month)	RM36,000.00
Contract Period	5 years
Total	RM2,160,000

RM1,260,000 + RM2,160,000 = RM3,420,000

[51] If one goes by what the plaintiff had asserted, then its loss is RM609,000 + RM3,420,000 = RM4,029,000.

[52] The figure does not compute because there had already been a summary judgment entered for the three months invoice issued for October to December 2017 for RM143,877.90.

[53] The defendant disputed this method of assessing the so-called loss of the plaintiff and highlighted the fact that the services for the balance of the contract period of five years after subtracting the first three months already invoiced had not been rendered yet.

[54] The defendant's objection is also on the ground of a double claim and an overclaim for not taking the sum already invoiced for which summary judgment had been entered for RM143,877.90.

[55] The approach taken here by the plaintiff in asking the court to award damages as written down, no doubt in a sworn affidavit, is tantamount to what had been disapproved as a way of claiming damages in *Lay Hong Food Corporation Sdn Bhd v. Tiong Nam Logistics Solutions Sdn Bhd* (*supra*) where it was observed as follows:

> [49] It is also to be observed that in making its claim for loss of profits, the plaintiff (TN Logistics) had produced a sheet of paper (see CB Vol 3 at p 503) known as 'Lay Hong Billing Summary' in the sum of RM1,555,675.14. This sheet of paper is unsigned. There were no primary documents or audited accounts produced by the plaintiff (TN Logistics) to prove the facts and the amount of the stated sum as loss of profits. Nevertheless, this was accepted by the learned JC as adequate proof of damages for the claim in loss of profits.
>
> Edgar Joseph J (as he then was) in his judgment in *Popular Industries Limited v. Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 which has since been adopted by the Court of Appeal and Federal Court observed that this is not the appropriate method in proving of damages when he said the following at pp. 366-369:
>
> > I now turn to consider the crucial question: have the plaintiffs proved their claim for damages as alleged or at all? With regard to this part of the case, I would preface what I have to say by referring to certain well-established principles.
>
> It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right. Thus, nominal damages may be awarded in all cases of breach (see *Marzetti v. William* 109 ER 842). And, where damage is shown but its amount is not proved sufficiently or at all, the court will usually decree nominal damages.

[56] After all, if by compensating the plaintiff by way of reference to the contract not having been breached, then the containers and the machines should not have been repossessed but that they should still be available to the defendant to use and that because of the breach, the defendant would now have to, on the pain of execution, pay the whole of the five-year rentals in advance.

[57] However, here, the plaintiff wanted to have the best of both worlds: to take back possession of the containers and the machines and at the same time sue to recover what it could have obtained from the defendant in terms of the rentals for the five-year period of the contract.

[58] The plaintiff must elect what is it that it wanted: to sue and recover now the damages based on the unexpired amount that it would have collected had the contract run its course or sue for loss of profit and repossessed the items in the ten used containers and the machines. It cannot have the cake and eat it. It cannot have the best of both worlds.

[59] One can analogise it with the same principle as enunciated in construction claims where the party suing for damages for breach has to elect between claiming for a loss of profit or for wasted expenditure.

[60] In *Delpuri-Harl Corp JV Sdn Bhd v. Perbadanan Kemajuan Negeri Selangor* [2014] 1 LNS 1075; [2015] 2 MLJ 24, the Court of Appeal explained as follows:

> [41] It is also trite that in the event of a breach of contract by a defaulting party, the claimant may either claim for his loss of profits or for his wasted expenditure. However, the claimant must elect either of them and cannot claim for both. In *Anglia Television Ltd v. Reed* [1971] 3 All ER 690, Lord Denning MR in his judgment said:
>
> > ... It seems to me that a plaintiff in such a case as this had an election: he can either claim for his loss of profits; or for his wasted expenditure. But he must elect between them. He cannot claim both. If he has not suffered any loss of profits – or if he cannot prove what his profits would have been – he can claim in the alternative the expenditure which has been thrown away, that is, wasted by reason of the breach. That is shown by *Cullinane v. British 'Rema' Manufacturing Co Ltd* [1953] 2 All ER 1261 1264; [1954] 1 QB 292 1265, at 303, 308.
>
> The above passage was followed with approval in *Ismail v. Haji Taib* [1972] 1 MLJ 259 (FC) (per Suffian FJ, as he then was) and recently in the Court of Appeal decision in *National Land Finance Co-Operative Society Ltd v. Westingmont Holdings Sdn Bhd* [2014] 1 AMCR 485 at p 499 (see also the Court of Appeal decision in *Ban Chuan Trading Co Sdn Bhd v. Ng Bak Guan* [2004] 1 MLJ 411; [2004] 1 AMR 81).

[61] In the absence of evidence as to what the plaintiff had done with respect to the ten used storage containers and the machines, it would not be for us to speculate on its losses.

[62] What we can say with certainty, in the circumstances of this case and the evidence adduced, is that the plaintiff had not proved its loss of RM3.6 million calculated based on the full five-year term of the contract at the agreed rates of rentals for the ten used storage containers and the machines.

[63] Moreover, credit must be given to the fact that the rentals for the first three months of the contract had already been granted in the summary judgment that was entered.

[64] The plaintiff had failed to prove its loss of RM3.6 million as damages that it obtained from the High Court on appeal from the Registrar's decision.

Whether The Award Of RM100,000 By The Registrar As Nominal Damages Is Reasonable And Right In The Circumstances Of The Case

[65] The plaintiff, in its two affidavits filed in support of its application for assessment of damages and in reply to the defendant's opposition, had averred to its loss consisting of the whole amount of rentals it would have collected if the contract had been performed to completion for the entire five-year period.

[66] To begin with, that cannot be right because the plaintiff had already claimed for the amount it had invoiced for October to December 2017 and for which summary judgment had been entered.

[67] There is also the element of costs that the plaintiff would have incurred had it been required at its end to fulfill its obligation had the defendant not defaulted.

[68] With respect, the learned High Court Judge had overlooked the fact that the plaintiff had taken possession of the used storage containers and the machines in the forklift and the crane soon after the defendant defaulted in payment in January 2018. The plaintiff had been silent when it had every opportunity to speak up and say what it did to the items repossessed.

[69] These are items that appear to be in great demand where the plaintiff's business is concerned because in its two quotations we read the common refrain in cl. 2.2 that "upon confirmation of this quotation and **the availability of equipment**; a minimum three weeks shall be allowed for preparation before delivering to destination." (emphasis added)

[70] As was perceptively pointed out by the learned Registrar in his brief grounds of judgment at para. 26, these containers and machines are not custom-made or designed specially for the defendant only. From the photographs exhibited of these items, they appear to be generic and common enough, the containers being 20 feet long.

[71] The plaintiff had not led any evidence on its costs in this contract and this is not a case where the plaintiff had stated that there are no costs involved.

[72] Where there is loss or damage suffered but the party claiming has failed to prove the damages, then only nominal damages would be awarded.

[73] The Federal Court in *Guan Soon Tin Mining Company v. Wong Fook Kum* [1968] 1 LNS 43; [1969] 1 MLJ 99 at p. 100 enunciated this principle as follows:

> The respondent, as plaintiff, of course had to discharge the burden of proving **both the fact and the amount of damages before he could recover**. Where he succeeded in proving neither fact nor amount of damage he must lose the action or, if a right was infringed, he would recover only nominal damages. **Where he succeeded in proving the fact of damage, but not its amount, he would again be entitled to an award of nominal damages only**. This statement of the law is concisely stated in *Mayne & McGregor on Damages* (12th Ed.) para 174 ... (emphasis added)

[74] The learned Registrar had awarded RM100,000 as nominal damages. We are rather uncomfortable in calling such a substantial amount as "nominal". Generally, the term "nominal" means minuscule or small in terms of amount or just a token sum.

[75] In *Beaumont v. Greathead* (1846) 2 CB 494 at 449, Maule J described nominal damages as "a sum of money that may be spoken of, but that has no existence in point of quantity". Often nominal damages are referred to as a token sum awarded where the amount could be small or minuscule (see *Sapwell v. Bass* [1910] 2 KB 486).

[76] However, a sum of RM100,000 as nominal damages for breach of contract is not without precedent as can be seen in the case of *Delpuri-Harl Corp JV Sdn Bhd v. Perbadanan Kemajuan Negeri Selangor* [2014] 1 LNS 1075; [2015] 2 MLJ 24 where the Court of Appeal explained as follows:

> [42] As the appellant had failed to elect to claim either for loss of profits or for wasted expenditure only, and the claim being bad for uncertainty in the circumstances, we decided to award the sum of RM100,000 which sum included the sum of RM70,575.45 assessed by DW1, as nominal damages to the appellant. This is on the basis that this court recognises the fact that the appellant did suffer some loss as a result of the wrongful termination.
>
> As for nominal damages they are said to be 'a sum of money that may be spoken of, but that has no existence in point of quantity' as held by Maule J in *Beaumont v. Greathead* (1846) 2 CB 494 at 499.
>
> A token sum is usually awarded for nominal damages and the amount could be small or minuscule. Just like sixpence in *Feize v. Thompson* (1808) 1 Taunt 121; a farthing in *Mostyn v. Coles* (1862) 7 H & N 872 and a shilling in *Sapwell v. Bass* [1910] 2 KB 486.
>
> *Undoubtedly, the cases cited above were decided in England in yesteryears. However, today it is not uncommon for nominal damages to be awarded in Malaysia in the thousands of ringgit, depending of course on the circumstances of the case. And in the case of Tahan Steel Corp Sdn Bhd v. Bank Islam Malaysia Bhd [2012] 2 MLJ 314 (CA), my learned brother Justice Mohd Hishamudin had occasion to say that the learned trial Judge was correct in awarding nominal damages of RM50,000 in the circumstances of that case.*

Where it is clear that the appellant had failed to furnish credible evidence to prove the amount of damages it claimed to have suffered but where it is equally clear that the appellant did suffer some loss and damage, then it will be an appropriate case for the court to award nominal general damages (see *Lee Sau Kong v. Leow Cheng Chiang* [1961] 1 MLJ 17 per Thompson CJ).

Conclusion

[43] In the result, the court held that while the unilateral termination of the contract by the respondent was unlawful, the quantum of damages awarded to the appellant would only be in *the sum of RM100,000 as nominal damages* as the appellant had failed to prove its loss of profits or the wasted expenditure. We also award interest at the rate of 5%pa on the said sum, the interest to run from 24 September 2008 (ie the date the cause of action arose) until date of realisation. (emphasis added)

[77] In *Tahan Steel Corporation Sdn Bhd v. Bank Islam Malaysia Bhd* [2012] 1 CLJ 959; [2012] 2 MLJ 314 the Court of Appeal did not disturb the award of nominal damages granted by the learned trial judge though it observed that the sum was rather generous as follows:

[47] The appellant/plaintiff is appealing against the award of nominal general damages in its favour amounting to RM50,000. Although this award is in favour of the appellant/plaintiff, nevertheless, the appellant/plaintiff is aggrieved by this award on the ground that this sum is manifestly inadequate. It is the contention of the appellant/plaintiff that the award of damages should not have been nominal; it ought to have been substantial.

[48] In the statement of claim, although there is a prayer for general damages (see para 33(10)), there is, however, no prayer that the damages be assessed at a later stage by a separate inquiry (be it by the trial judge or by a registrar); nor did the appellant/plaintiff ask either at the trial or in submission before the High Court that the general damages be assessed at a later stage.

[49] Needless to say that the burden of proof on the issue of quantum lies on the appellant/plaintiff.

[50] In my judgment, the learned *trial judge was correct in awarding only nominal general damages of RM50,000 (which, I think, is a generous sum, considering that it is meant to be only nominal). This is because having examined the evidence it is clear to me that the appellant/plaintiff had failed to furnish clear evidence as to the amount of damages that it suffered*. It is true that the learned trial judge, in her grounds of judgment, after having quoted what Thomson CJ (as he then was) in *Lee Sau Kong v. Leow Cheng Chiang* [1961] MLJ 17 at p 20, said:

> Guided by the same case, though I know that the plaintiff would suffer damages resulting from the defendant's breach, the assessment of damages is virtually impossible. (emphasis added)

[78] We too, would not disturb this generous sum of RM100,000 as nominal damages though we would not be comfortable to call it "nominal" but just "damages". A

[79] When one looks at the amount of gross revenue that could have been derived from the completion of the five-year contract of RM4,029,000 before factoring in the costs element and further when one looks at the rental to be collected, say for one year for the ten used containers which seem to be items with little maintenance costs, the rental would come up to about RM121,800 (RM4,900 x 12 + RM5,250 x 12 = RM121,800). B

[80] Assuming that it would take about one year to let out the ten used storage containers the amount of RM100,000 after taking into consideration some costs element does not appear to be unreasonable or excessive bearing in mind to the hassle of removing the ten used storage containers and the machines and the time, costs and expense in finding a new customer who may need the same items. C

[81] We are constrained to set aside the award of RM3.6 million as awarded by the learned High Court Judge. With the greatest of respect to the learned High Court Judge, we are of the view that there was a lack or an absence of judicial evaluation of the facts and evidence before her. As such, the learned High Court Judge had erred in awarding the damages as claimed by the plaintiff. The Federal Court in the case of *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1 explained the principle governing appellate intervention as follows: D E

> In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention, ie to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This is reflected in the Court of Appeal's restatement that *a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention, ie that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established plainly wrong test*. (emphasis added) F G H

[82] It was held by Lord Wright in *Davies v. Powell Duffryn Associated Collieries Ltd* [1942] AC 601 at p. 617 as follows:

> In effect the court, before it interferes with an award of damages, should be satisfied that the judge had **acted on the wrong principle of law, or has misapprehended the facts**, or has for these or other reasons made a **wholly erroneous estimate of the damage suffered**. (emphasis added) I

[83] After having carefully considered the appeal before us, we were satisfied that the above tests for an appellate intervention have been met and that the learned High Court Judge had erred in applying the law to the facts of the case, which warranted an appellate intervention.

[84] We had therefore allowed the appeal of the defendant/appellant and we set aside the order of the High Court in awarding damages of RM3.6 million together with interest and costs. The order of the Registrar was affirmed.

[85] We also ordered costs of RM10,000 to the appellant subject to allocator.